NALLAMMAL A/P MUTHUSAMY (M.W.) & ANOR.

v.

KARUPPANAN A/L MUTHUSAMY & ANOR.

HIGH COURT, KUALA LUMPUR
DATO' LIM BENG CHOON J.
[CIVIL SUIT NO. F 449 OF 1985]
6 AUGUST 1993

LAND LAW: Title obtained by fraud or misrepresentation - Thumb print on document procured by fraud or misrepresentation - Plea of non est factum - Admitting to non est factum - Effect of admission on lien-holders' caveat.

The 1st plaintiff is the registered owner of a piece of land and a house built thereon (disputed land). In February 1977 the 1st defendant went to the plaintiffs' house and asked for a loan of the title to the disputed land which he said he required in respect of some contract works which he wanted to perform. The 1st plaintiff after much persuasion from her husband, the 2nd plaintiff, gave the title, to be returned to her within a month or two. On 23 February 1979, the 1st defendant again went to see the 1st plaintiff, the 1st defendant brought with him a document (D6) for the 1st plaintiff to affix her thumb print on the document as told to do so by the 1st defendant. The 1st plaintiff was illiterate while the 2nd plaintiff could only read and write Tamil. The said title was used as a security to raise a loan from the 2nd defendant. The 1st defendant failed to return the said title to the plaintiffs.

Held:

[1] The 1st plaintiff was not fully aware of the effect and consequence of D6 when she thumb printed it as alleged by the 1st defendant. Had she been told that a lien-holders' caveat would have to be entered on the title to the disputed land an opportunity would have been given to her to consider and perhaps to seek advice from a third party as to whether she should allow the disputed land to be caveated as security for the loan taken by the 1st defendant.

[2] In allowing the doctrine of *non est factum* against the 1st defendant the result is that he has no right in law to make use of D6 as security for the loan and to enable the 2nd defendant to lodge a lien-holders' caveat on the disputed land.

[3] There is no doubt at all that the 1st defendant did defraud the plaintiffs in order to get possession of the title of the disputed land. By his wilful act of misleading the plaintiffs, the 1st plaintiff now stands to be deprived of her ownership and possession of the disputed land.

[4] The 2nd defendant, as the creditor, can be in no better position than the 1st defendant himself and cannot enforce the security against the 1st plaintiff when it was established that D6 was obtained by misrepresentation on the part of the 1st defendant. In any event the burden of proof that a lien-holders' caveat has been properly lodged is a heavy one. There is no sufficient proof of the alleged Torrens lien or statutory lien purported to be created by the proprietor of the disputed land, that is the 1st plaintiff. On the contrary the plaintiffs have discharged the burden of proving that the title of the disputed land was wrongfully taken from the 1st plaintiff by the 1st defendant to create a lien on it. It follows therefore that the lien-holders' caveat was likewise wrongfully lodged on the disputed land.

[Plaintiffs claim allowed with costs].

Cases referred to:

Foster v. Mackinnon [1869] 2 R 4 CP 704 ***(cit)***
Saunders v. Anglia Building Society [1971] AC 1004 ***(foll)***
P.J.T.V. (M) Sdn. Bhd. v. Roxy (M) Sdn. Bhd. [1980] 2 MLJ 136 ***(foll)***
Kingsworth Trust Ltd. v. Bell & Ors. [1986] 1 AER 423 ***(foll)***

Other sources referred to:

The Nature and Application of the Torrens Liens and Lien-Holder's Caveats in West Malaysia by S.Y. Kok [1983] 1 MLJ xl @ pli

For the plaintiffs - E. Ramasamy; M/s. E. Ramasamy & Co.
For the 1st defendant - Ramdas; M/s. Siva, Ram & Associates
For the 2nd defendant - Zamani bin Ibrahim; M/s. Hisham, Sobri & Kadir

JUDGMENT

Lim Beng Choon J:

In this suit the plaintiffs are praying firstly for a declaration that all documents purported to have been signed or thumb printed by the 1st plaintiff for the purpose of creating a lien holder's caveat over her land known as Lot No. 238, EMR No. 2118 in the Mukim of Batang Berjuntai, in the District of Kuala Selangor, in the State of

Selangor (hereinafter referred to as "the disputed land") be declared null and void and of no effect. Secondly they are also asking that the entries in respect of the lien holder's caveat lodged by the Bank Buruh (M) Berhad, the 2nd defendant *vide* Presentation No. 27/78 Jilid 7 Folio 57 dated 3 March 1978 over the disputed land be removed or be expunged from the record of the proper authorities concerned. Thirdly they claim that as more than 6 years have lapsed since the creation of the said lien holder's caveat, it therefore can be declared null and void and of no legal effect. By reason of the three aforementioned prayers they therefore ask that the disputed land be released by the 2nd defendant to the plaintiffs and that damages and costs of this action be paid by the defendants for fraud. However at the trial Counsel for the plaintiffs informed this Court that the plaintiffs were no longer asking for damages. The claim for damages has thus been abandoned.

The 2nd and 1st plaintiffs are husband and wife and at the time of the trial of this case they were 71 years and 64 years old respectively. The 1st plaintiff claimed that from her savings acquired from her earnings as a rubber tapper for some 25 years she was able to purchase the disputed land in 1975 and the purchase of the land was duly registered and the title of the disputed land was issued to her as the new owner - see exhibit P1. She built a house on the disputed land in which she was and still is residing. On or about 20 February 1977 the 1st defendant went to the plaintiffs' house and asked for a loan of the said title which he said he required in respect of some contract works which he wanted to perform. The 1st plaintiff was at first reluctant to hand the title to the 1st defendant but after some persuasion by her husband she agreed to and did hand over the said title to the 2nd plaintiff to give to the 1st defendant on condition that the said title be returned to her within a month or two. On 23 February 1979 at about 10.00 a.m. the 1st defendant again went to see the 1st plaintiff. During that visit the 1st plaintiff said she was alone in her house. The 1st defendant brought with him a document for her to affix her thumb print. She was not told anything about the contents of the document and she did affix her thumb print on the document as told to do so by the 1st defendant. When the 1st defendant failed to return the title to her within 2 months, the 2nd plaintiff wrote to the 1st defendant to ask for the return of the said title. There was no response and thereupon the 2nd plaintiff and his son, one Doraisamy, went to see the 1st defendant at hishouse about the said title. The 1st defendant gave all sorts of excuses for not returning the title and he promised to return the title in due course. After waiting for about one year the 2nd plaintiff again went with his two sons to see the 1st defendant. It was then that the 1st defendant told the 2nd plaintiff that the said title had been handed to the 2nd defendant as security for a loan but the 1st defendant again promised them that he would return the said title to the 1st plaintiff later. When the 1st defendant failed to return the said title after the plaintiffs had waited for another year, the latter thereafter engaged a lawyer to file this suit. The 1st plaintiff said in her evidence that she was illiterate while the 2nd plaintiff could only read and write Tamil.

The defence of the 1st defendant is that he personally informed both the plaintiffs as well as their son, Doraisamy, the reason for his wanting to get the title of the disputed land from them and that is to use it as security for a loan which he was applying from a bank. According to him it was on that basis that both the plaintiffs agreed to let him have the title.

With regard to the 2nd defendant, their defence is that there is no fraud committed by anyone in the present case. Even had there been a fraud committed it was committed by the 1st defendant and the 2nd defendant had no knowledge of any such fraud let alone acting in collusion with the 1st defendant to defraud the plaintiffs. They also denied any negligence on their part. They averred that they had acted properly and in accordance with law in accepting the title of the disputed land as security for the banking facilities granted to the 1st defendant and that the lien holder's caveat had been properly and lawfully created and lodged over the disputed land by them.

In considering the question of fraud allegedly committed by the 1st defendant against the two plaintiffs particularly the 1st plaintiff it is to be noted that in setting out the particulars of fraud of the 1st defendant in paragraph 14 of the statement of claim, the plaintiff averred *inter alia* that:

(i) the 1st defendant failed "to disclose the actual purpose of taking the said title deed" and

(ii) that he "fraudulently obtaining the thumb print of the 1st plaintiff on sheets of papers at her house."

Alternatively the plaintiffs averred that the 1st defendant gained possession of the said title under the pretext that it would be used to secure a contract job and that it was by misrepresentation that the 1st defendant managed to obtain the thumb print of the 1st plaintiff. Again in considering the question of fraud there is no doubt at all that the first question that should be asked is this: What exactly did the 1st defendant tell the plaintiffs when he visited them on 20 February 1977 to try to get the title of the disputed land? On the one hand both the plaintiffs said in evidence that the 1st defendant merely told them that he required the said title for purpose of showing it to the relevant authority to whom the 1st defendant had applied for certain contract works. On the other hand the 1st defendant's version was that he did inform both the plaintiffs at the material time that he required the title for the purpose of utilising it as security for a loan from Bank Buruh (M) Bhd. In view of these two inconsistent versions it is needless to say that I have to scrutinise with much care the totality of the evidence in order to determine whose version is more probable. In my scrutiny of the totality of the evidence the first thing that struck my mind is that there is no dispute that both the plaintiffs had been working as rubber tappers (although the 2nd plaintiff subsequently was promoted to the post of a mandor) for over 25 years before they could save enough to think of purchasing a piece of land. It is from their hard-earned moneys which they had prudently saved that enabled the disputed land to be purchased in 1975 which land was registered in the name of the 1st plaintiff. Furthermore they had constructed a house on the disputed land in which they and their children were and still are residing. Under the circumstances it is highly incredible that they would be willing to embark on any transaction which might cause them to be deprived of this one single property. No reasonable person in the shoes of the plaintiffs would be willing to take any risk of losing his land which he managed to buy from his savings accumulated over some 25 years. This proposition is supported by the evidence given by PW1 (the 1st plaintiff) when she said:

> Saya tidak akan beri geran tersebut kepada sesiapa walaupun anak saya sendiri untuk pinjaman duit. (Translation: I will not give the said title to anyone not even my own son for purpose of getting a loan.)

Indeed even DW1 (the 1st defendant) admitted in cross-examination that the plaintiffs owned no other property except the disputed land and that DW1 knew that they would never part with it. If as asserted by DW1 that the plaintiffs would never part with it, would it not be reasonable to opine that under the circumstances one would not expect them to take any risk which might jeopardise their ownership and possession of the disputed land? The second thing that struck my mind relates to the assertion by the 1st defendant that he did tell the plaintiffs the purpose of his wanting the title to the disputed land that is as security for his bank loan. Bearing in mind that to allow the disputed land to be held by a bank as security for the loan to be granted to the 1st defendant would inevitably involve an element of risk which would jeopardise the 1st plaintiff's ownership and possession of the disputed land, it is again highly incredible that the plaintiffs would agree to accept such a risk. The evidence given by PW1 which I have reproduced earlier lends support to such a proposition. It might be argued that as the plaintiffs belong to the labour class and being illiterate, they might not be aware of this risk. Such argument is best said and rejected for the simple reason that the plaintiffs being elderly persons must surely understand the implications involved in guaranteeing the repayment of a loan given to a third party. I use the word "guaranteeing" because in allowing the disputed land to be held as security for the loan the plaintiffs would be in effect guaranteeing the repayment of the loan. Should the 1st defendant fail to repay the loan the plaintiffs must surely know that the title of the disputed land would not be returned to them. The third point that is worthy of consideration relates again to the assertion made by the 1st defendant when he said in his evidence-in-chief that when he explained to the plaintiffs on 20 February 1977 about his need of the said title as security for a loan, the plaintiffs' eldest son V. Doraisamy (PW3) was not only present but it was he who advised the 1st defendant to approach his parents for the said title after the 1st defendant had informed him about the latter's financial problem and the reason for acquiring the said title. This discussion was, according to the 1st defendant, carried out in Doraisamy's house where the 1st defendant made a stop-over upon his arrival at Batang

Berjuntai on the evening of 20 February 1977. It was after the discussion that V. Doraisamy accompanied the 1st defendant in the latter's car to proceed to the plaintiffs' house where the discussion with the plaintiffs on the matter of the loan took place. PW1 and PW2 in their evidence categorically denied that their eldest son was present at the said discussion. Instead they asserted that V. Doraisamy was at the material time in Ipoh undergoing a training course. V. Doraisamy himself in his evidence corroborated what was said by his parents - he was at the material time attending a course for Askar Wataniah in Ipoh. He produced a letter dated 22 January 1991 (exhibit P2) which confirmed that he was attending such a course held in Ipoh from 8 February 1977 to 5 March 1977. The evidence of PW3 had not been successfully challenged neither was it contradicted in any material way. The fourth matter that disturbs me concerns the thumb printing of D6. In considering this matter it is necessary to examine the contents of D6 which read as follows:

> Nallammah A/P Muthusamy,
> Thenamaram Estate,
> Batang Berjuntai,
> Selangor, Malaysia.
>
> 23 February 1977.
>
> The General Manager,
> Bank Buruh,
> KUALA LUMPUR.
>
> Dear Sir,
>
> I, NALLAMMAH A/P MUTHUSAMY I/C NO. 7921639 of Thenamaram Estate, Batang Berjuntai, Selangor, have no objection in a caveat being lodged on my property known as EMR. 2118 Lot No. 238 Mukim of Batang Berjuntai, for the purpose of loan granted to Sharikat Karuppanan of 750 B, Jalan Gambut, Kuantan.
>
> Yours faithfully,
> (Thumbprint)

Even upon a cursory reading of D6, it cannot be said that D6 merely indicates that the 1st plaintiff had no objection to the title of the disputed land being kept by the 2nd defendant as security for the loan to be granted to the 1st defendant. D6 goes further in that it indicates that the 1st plaintiff had no objection to **a caveat** being lodged on the disputed land for the purpose of the said loan to be granted to the 1st defendant's company. The crucial question that I need to ask myself is whether at the material time the contents of D6 had been fully explained to the 1st plaintiff before she affixed her signature on D6. Bearing in mind the nature of the disputes in the present case, it is significant (as can be seen later in this judgment) to find a correct answer to this question. Now in going through the totality of the evidence, I found that the 1st plaintiff categorically denied that the contents of D6 were ever conveyed to let alone explained to her. The two witnesses DW2 and DW3 who testified for the 2nd defendant could not even say who prepared D6 or who brought D6 to the 2nd defendant Bank. All they could say is that the 2nd defendant made use of D6 as an authority to lodge a lien-holder's caveat on the disputed land. The 1st defendant as DW1, however, was able to give some evidence relating to the person or body who prepared D6. According to DW1 exhibit D6 was handed over to him by one Mr. Charles, an officer of the 2nd defendant Bank and in doing so Mr. Charles was said to have told DW1 that D6 merely indicated that:

> the owner of the title had no objection to the title to be kept as security for the loan.

It is not disputed that neither DW1 nor both the plaintiffs could read English. It must therefore follow that even assuming that DW1 had explained the contents to the 1st plaintiff at the time when she was asked to sign D6 as asserted by DW1, the latter's explanation would carry no further than what Mr. Charles had informed him about the contents of D6. Indeed DW1 in his evidence said that the 1st plaintiff kept asking him subsequently for the return of the said title and accused him of cheating her "and not telling her of the caveat." In such a situation I cannot but hold that the 1st plaintiff was not fully aware of the effect and consequence of D6 when she thumb printed it as alleged by the 1st defendant. Had she been told that a lien-holder's caveat would have to be entered on the title to the disputed land an opportunity would have been given to her to consider and perhaps to seek advice from a third party as to whether she should allow the disputed land to be caveated as security for the loan taken by the 1st defendant. As I have stated earlier the disputed land was the only property owned by the 1st plaintiff and on the disputed land she had built her house in which she was and is still residing with the 2nd plaintiff and their children. Had the 1st plaintiff been told of the nature of D6 it is most probable that she would at the very least have questioned the 1st defendant as to his capability to repay

and the manner of repaying the loan. From the evidence both the plaintiffs said repeatedly that they would only hand over the title of the disputed land to the 1st defendant provided that he returned it within a month or two. The 1st defendant in his evidence also said that in handing over the said title to him both the plaintiffs repeatedly did say that they would only hand the said title to him provided he returned the same to them "as quickly as possible." This piece of evidence shows that it is highly improbable that the 1st plaintiff would have signed D6 as allegedly by the 1st defendant had she been told of the contents of D6.

The fifth matter which I have to take into consideration is the following question posed to the 1st defendant in cross-examination by Counsel for the plaintiffs:

> When you saw the 1st plaintiff did you explain to her that you wanted the title to be retained as security for a loan from the Bank on the sum of RM200,000?

His answer is a simple "No". In re-examination he tried to repair the damage done to his case by saying that he did convey to the 1st plaintiff his intention of getting the title to the disputed land which was "to get a loan" although he did not mention the amount of the loan he was to get from the 2nd defendant bank. But his answer given in the re-examination is still inconsistent with what he had said earlier in the cross-examination. The question posed to him earlier is:

> Q: Did you tell the plaintiffs how much loan you were taking?

His answer is:

> A: I explained to them that I needed a loan for a sum of RM200,000 ...

Notwithstanding the inconsistency, DW1's assertion that he did not inform the plaintiffs of the amount of the loan to he taken by him is part of his evidence and as such it cannot be disregarded.

In considering this assertion of DW1 in the context of the evidence as a whole I would have to say that the said assertion only goes to lend support to the plaintiff's case simply because it is highly incredible that the plaintiffs would be willing to hand the title of the disputed land to the 1st defendant as security for his loan the amount of which was not even made known to them. It is incredulous that an owner of only one piece of landed property would agree to let that property be used as security for a loan without knowing the amount of the loan which might well reach over a million ringgit. In the nature of things I would say that the owner of such a land would certainly want to know the amount of the loan before he could even begin to consider whether to accede to the borrower's request for his title. In the ultimate analysis I am satisfied that the 1st defendant did not at all material times convey to the plaintiffs that he wanted the title of the disputed land for the purpose of using it as security for the loan which he wanted to borrow from the 2nd defendant. I fully accept the plaintiffs' assertion that the reason given by the 1st defendant for wanting the title was to show it to the relevant authority who was supposed to consider the 1st defendant's application for some contract works in clearing jungles.

One final matter which is relevant *viz-a-viz* the 1st defendant's case is that on the second day of the hearing Counsel for the 1st defendant informed me that his client accepted that the doctrine of *non est factum* as pleaded by the plaintiffs in their statement of claim could be applied in favour of the plaintiffs. The only allegation which the 1st defendant would not admit and would be contesting was the allegation of fraud made against him. Counsel for the 2nd defendant, however, said that he had no instructions to accept the said doctrine and they would be contesting the averment on the affidavits concerning the said doctrine.

In view of the 1st defendant's acceptancee of the doctrine of *non est factum* as stated above it is essential to enquire as to the legal effect of such acceptance. The plea of *non est factum* was formerly held by the English Judges to be available only if the mistake was as to the very nature of the transaction - if a party had been misled into executing a deed or signing a document essentially different from that which he intended to execute or sign he could successfully plead *non est factum* in an action against him - see *Foster v. Mackinnon* [1869] 2 R 4 CP 704 @ 711. The law on this subject was completely reviewed and restated by the House of Lords in *Saunders v. Anglia Building Society* [1971] AC 1004 where it was held that in exceptional cases the plea was available so long as the person signing the document had made a fundamental

mistake as to the character or effect of the document. Their Lordships appear to have directed their minds on the disparity between the effect of the document actually signed and the document as it was believed to be. It was also held that the disparity must be "radical", "essential", "fundamental", or "very substantial." Transposing this principle of law to the present case, it is clear that the doctrine is available to the plaintiffs because:

(a) the 1st plaintiff has no knowledge at all regarding the contents of D6 on which she affixed her thumb print;
(b) this complete lack of knowledge must result in her thinking that she was signing a document which she believed would not have the legal effect as created by the said document;
(c) the affixation of her thumb print on D6 would certainly result in a disparity that is fundamental or at least very substantial in that she had unknowingly and without any fault on her part thumb printed D6 which certainly has an adverse effect on her ownership and possession of the disputed land. Indeed if I may go one step further, the 1st plaintiff was wrongfully misled or induced by the 1st defendant to affix her thumb print on D6.

In allowing the plea of the said doctrine against the 1st defendant the result is that he has no right in law to make use of D6 as security for the loan and to enable the 2nd defendant to lodge a lien-holder's caveat on the disputed land.

Turning to the issue of fraud, the case of *P.J.T.V. (M) Sdn. Bhd. v. Roxy (M) Sdn. Bhd.* [1980] 2 MLJ 136 @ 138 gives a useful definition of what amounts to fraud where it was said:

> Whether fraud exists is a question of fact, to be decided upon the circumstances of each particular case. Decided cases are only illustrative of fraud. Fraud must mean "actual fraud, i.e. dishonesty of some sort" for which the registered proprietor is a party or privy. "Fraud is the same in all Courts, but such expressions as 'constructive fraud' are ... inaccurate:" but "fraud" ... implies a wilful act, on the part of one, whereby another is sought to be deprived, by unjustifiable means, of what he is entitled." (per Romilly M.R. in *Green v. Nixon*). Thus in *Waimiha Sawmilling Co. Ltd. v. Waione Timber Co. Ltd.* it was said that "if the designed object of transfer be to cheat a man of a known existing right, that is fraudulent ....

Transposing this definition of fraud to the present case and upon the reasons stated earlier in this judgment I have no doubt at all that the 1st defendant did defraud the plaintiffs in order to get possession of the title of the disputed land. By his wilful act of misleading the plaintiffs, the 1st plaintiff now stands to be deprived of her ownership and possession of the disputed land. If that is not fraudulent I do not know what is.

I now come to the case for the 2nd defendant. It is common ground that the title deed of the disputed land and the purported letter of consent D6 were *inter alia* relied upon by the 2nd defendant in giving the loan to the 1st defendant as well as the lodging of a lien-holder's caveat on the disputed land. Without the said title and D6 the 2nd defendant would not have approved the loan application of the 1st defendant (see exhibit D3). The defence of the 2nd defendant is that even had the 1st defendant obtained D6 by fraudulent means the 2nd defendant had no knowledge of the same. There is no evidence to suggest let alone establish that the 2nd defendant or their agents or servants had colluded with the 1st defendant in defrauding or misleading the plaintiffs. Indeed the 2nd defendant asserted that the lien-holder's caveat was properly and lawfully lodged.

Once again I shall examine the case law governing the defence of the 2nd defendant. The case of *Kingsworth Trust Ltd v. Bell & Ors.* [1986] 1 All ER 423 @ 427 is a good illustrative authority as to the liability (if any) of the 2nd defendant in the present case. In that case the plaintiffs entrusted Mr. Bell to obtain his wife's signature on the mortgage deed in respect of the property which had at all material times been the matrimonial home of Mr. and Mrs. Bell. The legal estate of the property was vested in Mr. Bell alone but it was not disputed that Mrs. Bell had a beneficial interest in the property as she had contributed to the purchase price. The plaintiffs there gave a loan to Mr. Bell on the security of the property by way of a second mortgage created by Mr. Bell with the purported concurrence of Mrs. Bell. The question posed to the Court of Appeal was whether Mrs. Bell could establish that she was not bound by the terms of the mortgage having regard to Mrs. Bell's contention that she executed the mortgage at the request of her husband and under his influence and without separate advice. She therefore asserted that the mortgage was not binding on

her. The Court of Appeal held in favour of Mrs. Bell. Dillon LJ. who delivered the first judgment made laid down the following principle which is useful to me in my deliberation of the 2nd defendant's case:

> ... if the creditor entrusts to the husband himself the task of obtaining the execution of the relevant document by the wife, then the creditor can be in no better position than the husband himself, and the creditor cannot enforce the guarantee or the security against the wife if it is established that the execution of the document by the wife was procured by undue influence by the husband and the wife had no independent advice.
>
> This is clear law. The Judge held that these authorities were not applicable to the present case because in the present case Mrs. Bell knew that she was signing a charge on her home, although she was misled as to the reason why such a charge was expedient. I cannot, for my part, see that this is a valid distinction. I cannot see any difference in principle between the case of a husband who by his influence procures his wife to execute the document he requires of her without giving her any explanation of it and the case of a husband who in similar circumstances procures the execution of the document by giving her a deliberately false explanation. It cannot matter whether the false explanation relates to the nature of the document or the supposed reason why it should be signed; in each case the signing of the document has been induced by a fraudulent misrepresentation.

In the present case it is appropriate to consider the evidence of a witness, DW3, called by the 2nd defendant to testify on their behalf. DW3 was one Charles Sathenathan ("Charles") who was at the material time the head of the Credit Department of the 2nd defendant. He admitted that it was he who at the material time dealt with the 1st defendant's application for the loan. In his dealing with the 1st defendant he admitted that a requirement of the Bank for the loan was the document, D6 and he did tell the 1st defendant of the said requirement. However he denied that he told the 1st defendant about the contents of D6. He also denied that D6 was prepared by the Bank. Looking at the totality of the evidence adduced at this trial I am satisfied that Charles did inform the 1st defendant to get the title of another piece of land as security for the loan. The said title would then be held by the 2nd defendant to enable them to lodge a lien-holder's caveat. The logical conclusion from this finding is that the 2nd defendant entrusted the 1st defendant with the task of obtaining if not D6 at least a document similar to D6 duly signed by the owner of the additional piece of land before they would approve the loan.

More importantly one should note that D6 contains only the thumb print of the 1st plaintiff. This should at least suggest to the 2nd defendant that the 1st plaintiff as owner of the disputed land is an illiterate person who might not appreciate the contents of D6 particularly when D6 speaks about caveating the disputed land. Furthermore prior to the confession made subsequently by the 1st defendant, no one had informed the plaintiffs about using the disputed land as security for the loan taken by the 1st defendant and that a caveat had been lodged.

For the above reasons the 2nd defendant, as the creditor, can be in no better position than the 1st defendant himself and cannot enforce the security against the 1st plaintiff when it has been established that D6 was obtained by misrepresentation on the part of the 1st defendant. In any event the burden of proof that a lien-holder's caveat has been properly lodged is a heavy one. In support of this proposition I would like to quote a passage from an article entitled "**The Nature And Application Of The Torrens Liens And Lien-Holder's Caveats In West Malaysia"** by S.Y. Kok appearing in [1983] 1 MLJ xl @ pli where the learned writer said:

> It is submitted that nothing requires to be more strictly proved than the proof of an alleged Torrens lien or statutory lien purported to be created by an entry of a lien-holder's caveat on the strength of a mere deposit without any supporting written memorandum. This strictness is to guard against any fraud that could possibly be practised on a proprietor. To make out the element of deposit, it is incumbent on the plaintiff-depositee to prove that the proprietor's act of deposit was made on the advance of the money; the depositee must connect the deposit made between the depositor (proprietor) and himself with the advance. To do otherwise would mean interpreting the Torrens sections creating lien too loosely and contrary to the views shared by the judges in the Federated Malay States that such sections should be strictly construed and applied or else the security of tenure of land which the Torrens statutes seek to set up would be seriously undermined. **To hold otherwise would mean that every landowner in West**

Malaysia is liable to have his estate caveated by an improper lien-holder's caveat, by the mere production by any stranger of the proprietor's title to his land, without any proof of how the title may have got into the stranger's possession. To uphold this incorrect interpretation would amount to a solecism of the substantive law governing the creation of Malaysian Torrens liens and could lead to ridiculous legal principles being set whereby possession of title to land by fraud or misrepresentation or even a simple deposit of a title to land by a vendor (or a developer) with a purchaser or the purchaser's financier so as to facilitate the registration of an instrument of transfer and subsequent charge could be misconstrued by the financier or its advisers as being within the ambit or operation of s. 281(1) when, right at the offset, no connection between the deposit of title and the housing loan could be shown by the financier to exist between the vendor-depositor and the financier-depositee.
(Emphasis supplied).

The learned writer also gave several instances whereby the element of deposit of title is deemed to be unconnected with the loan advancement and is, therefore, not proven and I need only mention two of such instances. They were:

(i) possession of title obtained by a depositee through fraud or misrepresentation and;
(ii) deposit of title has not been authorised by a proprietor or was carried out without the consent of the proprietor.

In the present case it is clear that the possession of the title to the disputed land was obtained by the 1st defendant through fraud or misrepresentation and as such the deposit of title has never been authorised by the 1st plaintiff the proprietor of the disputed land.

From my findings as set out above the only conclusion I can arrive at is that there is no sufficient proof of the alleged Torrens lien or statutory lien purported to be created by the proprietor of the disputed land, that is the 1st plaintiff. On the contrary the plaintiffs have discharged the burden of proving that the title of the disputed land was wrongfully taken from the 1st plaintiff by the 1st defendant to create a lien on it. It follows therefore that the lien-holder's caveat was likewise wrongfully lodged on the disputed land. The orders or declarations requested for by the plaintiffs in prayers (a), (b) and (d) are allowed. Prayer (e) is for damages for fraud which has been withdrawn by the plaintiffs. The 1st and 2nd defendants are directed to pay the costs of this proceedings to the plaintiffs.